**BARCLAYS BANK PLC**

**v.**

**MALAYSIAN SEA BEST SDN BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
AZAHAR MOHAMED J
[SUIT NO: D8-22-311-2008]
26 JUNE 2009

***NEGOTIABLE INSTRUMENTS:*** *Promissory note - Enforcement of claim - Allegations of falsification and forgery of documents - Whether defence available - Bills of Exchange Act 1949, s. 29(1)(b)*

***NEGOTIABLE INSTRUMENTS:*** *Promissory note - Holder - Whether plaintiff holder in due course - Bills of Exchange Act 1949, s. 29(1)(b)*

***CIVIL PROCEDURE:*** *Summary judgment - Claim on promissory note - Allegations of falsification and forgery of documents - Whether triable issues raised - Rules of the High Court 1980, O. 14 - Bills of Exchange Act 1949, s. 29(1)(b)*

The plaintiff applied for summary judgment against the 2nd defendant to enforce its claim on a promissory note ('PN') made by the 1st defendant for EURO 10,000,000 whereby the 2nd defendant by way of an aval endorsement agreed to make the payment for the 1st defendant. By way of a transfer power, the plaintiff had acquired the rights, title and interest in the PN for value, without recourse, from HSBC Bank USA. The 2nd defendant opposed the plaintiff's application for summary judgment by arguing that the documents concerning the PN were falsified and forged.

**Held (allowing the plaintiff's application with costs):**

**(1)** The plaintiff was a "holder in due course" of the PN as stipulated under s. 29(1)(b) of the Bills of Exchange Act 1949 as the plaintiff took the PN from HSBC bank USA in good faith and for value with no notice of any defect of title to the PN. It was essential to emphasise that the plaintiff was neither a party nor privy to all the alleged falsification and/or forgery that the 2nd defendant raised in the proceedings. The plaintiff's claim against the 2nd defendant was in the capacity of a holder for value of the PN which was not disputed and not an issue in the proceedings. It followed that by virtue of s. 38(b) of the said Act, the issue of falsification/forgery, defect of title or other

personal defences that the 2nd defendant might have had with the 1st defendant and/or HSBC bank USA were not available to the 2nd defendant in the instant proceedings. Therefore, the 2nd defendant's allegations of falsification and/or forgery were not triable issues that could be raised against the plaintiff's claim. (paras 9, 10 & 14)

**(2)** Where the issue raised in essence is a question of law and where the facts are clear and undisputed, the court should exercise its duty under O. 14 Rules of the High Court 1980 and give judgment for the plaintiff. It is an established principle of law that an O. 14 application is to enable a plaintiff to obtain summary judgment without trial, if he can establish his claim unmistakably and if the defendant is not capable to raise an issue which ought to be tried. (para 15)

**Case(s) referred to:**
*Bank Fur Gemeinwirtschaft v. London Garages [1971] 1 WLR 149*
*Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC*
*Jones v. Gordon [1877] 2 App Cas 616*
*Mercantile Bank Ltd, Ipoh v. Yoon Siew Kang [1969] 1 LNS 107 FC*

**Legislation referred to:**
Bills of Exchange Act 1949, ss. 29(1)(b), 38(b)
Rules of the High Court 1980, O. 14

*For the plaintiff - Anis Hashim; M/s Shearn Delamore & Co*
*For the defendant - Shahrul Nizam (Farah Marzuki with him); M/s Omar Ismail Hazman & Co*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Azahar Mohamed J:**

**[1]** This is an application (encl. 13) by the plaintiff to enter summary judgment pursuant to O. 14 of the Rules of the High Court 1980 (the RHC) against the 2nd defendant and an order that the 2nd defendant pay to the plaintiff the sum of EURO 10,000,000 and interest at the rate of 4.11% on the sum of EURO 10,000,000 from 3 March 2008 to the date of judgment and also costs. The grounds of this application are that the 2nd defendant does not have a defence to this action and/or that there are no issues to be tried.

**[2]** The plaintiff's claim against the 2nd defendant for EURO 10,000,000 is pursuant to a "Per Aval" endorsement executed by the 2nd defendant on a Promissory Note (the PN) whereby the 2nd defendant by the per aval endorsement to the PN have expressly agreed to make payment of EURO 10,000,000 for the account of the 1st defendant. The 2nd defendant's per aval endorsement on the PN stipulates "Per aval for the account of Malaysia Sea Best Sdn Bhd." The PN was in the following terms:

**Malaysian Sea Best Sdn Bhd**
**Promissory Note**

Reference: SeaBest/EURO/HSBC1

Selangor Darul Ehsan, Malaysia

| | |
|---|---|
| 1 March 2006 | In effective EURO 10,000.00 |
| On/at | 1 March 2008 |
| For value received we, | Malaysian Sea Best Sdn Bhd.<br>No. 12, Jalan P2/1, Seksyen 2,<br>Bandar Teknologi Kajang<br>Semenyih 43500 Kajang,<br>Selangor Darul Ehsan,<br>Malaysia. |

PROMISE TO PAY against this PROMISSORY NOTE

| | |
|---|---|
| To the order of: | HSBC Bank USA, National Association<br>10 East 40th Street<br>New York, NY 10016-0200 |
| The Amount of: | Euro Ten Million only |

Effective payment to be made in Euro only, without deduction for and free of any taxes, collection charges, impost, levies, or duties present or future of any nature whatsoever, and without set-off or counterclaim.

This Promissory Note

| | |
|---|---|
| Is payable at the counters of: (Semenyih Branch) | Malayan Banking Berhad<br>1 & 2, Taman Semenyih<br>43500 Semenyih<br>Selangor Darul Ehsan, Malaysia<br>Current Account No. 512521129097 |

Malaysian Sea Best Sdn. Bhd

| Sign. | Sign. |
|---|---|
| ... | ... |
| Name: Gazali bin Rashid | Name: Rusita binti Mohd. Aris |
| NRIC No. 600229-10-6583 | NRIC No. 620728-10-6332 |
| General Manager/Director | Director |

Per Aval for Account of Malaysian Sea Best Sdn Bhd.
For and on behalf of Majuikan Sdn Bhd

| Sign. | Sign. |
|---|---|
| ... | ... |
| Name: Mohd. Nor bin Hassan | Name: Mohd. Khairuddin bin Abu Bakar |
| NRIC No. 491015-11-5193 | NRIC No. 571005-10-5311 |
| Director/Chief Executive Officer. | Senior Manager |

**[3]** It is to be noted that the PN in which the 2nd defendant endorsed is a promissory note made by the 1st defendant on 1 March 2006 for EURO 10,000,000 by which the 1st defendant in consideration of value the 1st defendant received, have promised to pay against the said PN on 1 March 2008 a sum of EURO 10,000,000 to the order of HSBC Bank USA, National Association, 10 East 40th Street, New York, NY 10016-0200 ("HSBC USA").

**[4]** The express terms of the said PN is that the said PN is payable on 1 March 2008 at the counters of Malayan Banking Berhad (Semenyih Branch), 1 & 2, Taman Semenyih, 43500 Semenyih, Selangor Darul Ehsan, Malaysia, Current Account No. 512521129097 ("MBB"). The effective payment of the said PN is to be made in Euro only, without deduction for and free of any taxes, collection, charges, impost, levies or duties present or future of any nature whatsoever, without set off or counterclaim.

**[5]** The plaintiff in this matter is a holder of the said PN by virtue of HSBC USA assigning and transferring to the plaintiff without recourse all its rights, title and interest in the said PN by way of a Transfer Power dated 15 March 2006 endorsed by HSBC USA by for value it received. The Transfer Power was in the following terms:

**Transfer Power**

**This transfer power is to be attached to and made a part of that certain promissory note** (reference the "SeaBest/EURO/HSBC1 NOTE") dated as of 1 March 2006, made by Malaysian Sea Best Sdn Bhd. In favour of HSBC Bank USA, National Association, having a principal amount of EURO10,000,000.00.

For value received, the undersigned hereby assigns and transfers unto Barclays Bank PLC, without recourse, all of its rights, titles and interest in such SeaBest/EURO/hsbc1 NOTE.

HSBC Bank USA, National Association
By: sign.
Name: Stephen Ferrera
Title Authorized Signatory
Dated: 15 March 2006.

**[6]** Now, pursuant to the terms of the said PN, the plaintiff did on 3 March 2008 (1 March 2008 being a Saturday) duly present the original PN for payment at the counter of the Semenyih branch of MBB. In spite of this, the said PN was dishonoured for non-payment by MBB on 3 March 2008.

**[7]** Following the dishonour of the said PN for non-payment by MBB on 3 March 2008, the plaintiff through its letters dated 3 March 2008 to the defendants respectively, gave the defendants notice of dishonour of the said PN by non-payment and sought the defendants to make immediate payment of EURO 10,000,000. The defendants have since then failed, neglected and/or refused to make payment of the aforesaid sum. The plaintiff separately through its solicitors did by letters dated 6 March 2008 to the defendants demanded that the defendants make immediate payment and/or by latest 5pm 7 March 2008 the sum of EURO 10,000,000. The defendants have to date failed refused and/or neglected to pay the sum of EURO 10,000,000 or any part thereof.

**[8]** In opposing the plaintiff's application to enter summary judgment, learned counsel for the 2nd defendant has raised the issue of the falsification of the documents concerning the PN. In this way, it was argued that the signatures of Mohd Nor bin Hassan and

Mohd Khairuddin ("the signatories") were falsified as the said PN was never executed by the signatories and that the signatories were not given any authorisation and/or permission to sign the said PN. Learned counsel emphasised that the relevant resolution of the 2nd defendant's board of directors was also falsified.

**[9]** Now, based on the affidavit evidence before this court, there can be doubt that the plaintiff is a holder in due course of the said PN who have taken the same in good faith and for value from HSBC USA. The plaintiff is a "holder in due course" of the said PN as stipulated under s. 29(1)(b) of the Bills of Exchange Act 1949 (the Act) as the plaintiff took the said PN from HSBC USA in good faith and for value with no notice of any defect of title to the said PN. It is essential to emphasise that that the plaintiff is neither a party nor privy to all the alleged falsification and/or forgery that the 2nd defendant has raised in these proceedings. The plaintiff's claim against the 2nd defendant as an endorser of the said PN, is in the capacity of the plaintiff as a holder for value of the said PN who took the said PN in good faith and for value with no notice of defect of title to the same by HSBC USA assigning and transferring without recourse all its rights, title and interest in the said PN by way of a Transfer Power dated 15 March 2006 endorsed by HSBC USA for value it received from the plaintiff.

**[10]** As the plaintiff's position as a holder in due course of the said PN who took the said PN from HSBC USA in good faith and for value with no notice of any defect of title to the said PN is not disputed and not an issue in these proceedings, following s. 38(b) of the Act, the issue of falsification/forgery, any defect of title or other personal defences which are issues (if any) that maybe available to the 2nd defendant may have with the 1st defendant and/or HSBC USA being the prior parties to the plaintiff is not available to the 2nd defendant as a defence against the plaintiff's claim herein where the plaintiff is a holder in due course of the said PN.

**[11]** In *Mercantile Bank Ltd., Ipoh v. Yoon Siew Kang* [1969] 1 LNS 107 the Federal Court held the bank being a holder in due course, who took the cheques in good faith and for value and had no notice of any defect in the title of the party who negotiated them to the bank is entitled to recover the amount on the cheques despite the cheques being given fraudulently by the defendant to a

third party before being negotiated to the bank. In *Mercantile Bank Ltd., Ipoh v. Yoon Siew Kang, the Federal Court* quoted with approval the speech Lord Blackburn in *Jones v. Gordon* [1877] 2 App. Cas. 616 who said:

> I should be extremely sorry to say anything which should cast doubt upon the principle of bill of exchange … is negotiable to the fullest extent of its kind. The negotiation of these bills of exchange in a mercantile country like this is of great value … if it can be shown that a bill of exchange at its inception was not a good bill of exchange and that originally it was obtained by fraud, yet a person who has taken it *bona fide* and for value is entitled to sue upon it even though is its shown that there was an infirmity or vice in the title of some of those persons who passed it unless the knowledge of that vice is brought home to him who took it.

**[12]** Indeed, the English Court of Appeal in *Bank Fur Gemeinwirtschaft v. London Garages* [1971] 1 WLR 149 allowed a summary judgment application brought by a holder in due course and held the defences of fraud and illegality failed where there is unchallenged evidence that the plaintiff as a holder of the bills of exchange have given value in good faith for the bills of exchange. There, a German bank, holder of bills of exchange, drawn in London and discounted in Hamburg, which had not been honoured on the due date, claimed summary judgment against the defendants, two English companies, a director of the two companies and an Indian bank which carried on business in England, as drawer, acceptor and indorsers of the bills. The first three defendants sought leave to defend on the grounds of fraud and illegality on the part of the London manager of the Indian bank on the issue, acceptance and indorsement of the bills. The plaintiffs, in an affidavit in reply, supported by contemporary documents, set out facts which showed that the German company which had discounted the bills and for which the plaintiffs were agents, had at no time had reason to question the authority of the bank manager to guarantee or sign the bills on behalf of his bank, nor to suspect his *bona fides*. The Indian bank, which denied that their London manager had authority to bind the bank by his sole signature was given leave to defend, but the judge refused the first three defendants leave to defend. On appeal by those defendants, the Court Of Appeal dismissed the appeal and held that there was uncontested evidence that the German company gave value in good faith and did so subsequent

to any fraud or illegality at the earlier stages of the bill, and accordingly the defences of fraud and illegality failed; and since there was no other reason which justified the giving of leave to defend, the plaintiffs were entitled to judgment. Cairns LJ in dealing with summary jurisdiction had this to say at p. 155.

> It is clear that if fraud is proved the holders have the onus of proving that they, or the previous holders who indorsed to them, took the bills in good faith and for value. Since in Order 14 proceedings the defendant cannot be required to establish his defence (it being sufficient for him to show that he has some grounds which would constitute a defence if what he alleges were proved at the trial) it must follow that in an action on a bill of exchange he is entitled to leave to defend if he sets up a case of fraud affecting the bill, unless the plaintiff in his turn can establish that the bill was taken in good faith and for value. Mr. Finlay goes further and says that once a case of fraud is set up leave to defend must be given, the plaintiff's possible answer to it being something which he cannot successfully establish under Order 14, but must establish at the trial.
>
> This proposition is based on a statement in the *Supreme Court Practice* (1970) vol. 1, p.133, under the heading "Bill of Exchange":
>
> > 'Where there is fraud in the inception of a bill there is no longer a presumption that value has been given.' When the defence is set up that the bill was obtained by fraud, and the defendant desires to have the fact that value was given by the plaintiff strictly proved, there is no power on a summons under O. 14 to test the story of either party. Leave to defend must be given.
>
> This seems to me a surprising proposition. I readily accept that if in Order 14 proceedings there is a real issue as to whether the bills were taken in good faith and for value that issue cannot be resolved at that stage and leave to defend must be given. But if there is clear evidence of value given in good faith, and no ground shown on which that evidence can be challenged, then the defendant's allegation of fraud does not constitute material which would afford a defence.

**[13]** And further down at p. 158 His Lordship said:

> And I consider it of great importance that the right of a holder in due course to obtain judgment as speedily as possible for what is due to him under a negotiable instrument should be maintained.

**[14]** Thus, going by the above principles, it is my judgment in the present case that all the 2nd defendant's allegations of falsification and/or forgery cannot be found as a triable issue nor available as a defence to the 2nd defendant in this proceedings to defeat the plaintiff's summary judgment application as the plaintiff is by clear, undisputed and unchallenged evidence before this court a *bona fide* a holder in due course of the said PN who had taken the said PN in good faith, for value paid to HSBC USA and with no notice of any defect of title to the said PN at all material times.

**[15]** Where the issue raised is in essence a question of law and where the facts are clear and undisputed, the court should exercise its duty under O. 14 of the RHC and give judgment for the plaintiff (see: *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14). It is an established principle of law that O. 14 is to enable a plaintiff to obtain summary judgment without trial, if he can establish his claim unmistakably and if the defendant is not capable to raise an issue which ought to be tried. This is the principle of law which I would act upon in the case at hand. In my view, the 2nd defendant has not raised an arguable issue which would require a trial in order to determine it.

**[16]** As a consequence, based on all the aforesaid reasons, the plaintiff's application in encl. 13 is allowed with costs.